Supreme Court, U.S.
FILED
APR 25 2002
OFFICE OF THE CLERK

No. 01-1420

IN THE

Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, *et al.*,

Petitioners,

v.

GUARDIANSHIP ESTATE OF DANNY KEFFELER, by WANDA PIERCE, Guardian, and other persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Rather than confront the question decided by the Washington Supreme Court, the State of Washington suggests a question presented that requires no intervention of this Court to answer. After reciting that the Social Security Act authorizes the appointment of representative payees and that Social Security regulations authorize payees to use the benefits to pay for the beneficiary's current care, the State asks whether a representative payee that uses the benefits to pay for the beneficiary's current care violates the anti-alienation provisions of 42 U.S.C. § 407(a). As this case raises no challenge to the regulations authorizing representative payees to use benefits for the current maintenance of the beneficiary, the answer to that question for purposes of this action is "no," so long as the payment is in the beneficiary's best interest.

The questions presented to and decided by the Washington Supreme Court were far more complex. Respondents oppose the grant of certiorari in this case, but respectfully suggest that if the Court is inclined to review this matter, certiorari should be granted to review a question that was actually decided by the court below and not to answer the overly simplistic tautological question suggested by Petitioner. Respondents respectfully suggest that this case presents the following questions:

1. Washington State statutes and regulations mandate that the Washington Department of Social and Health Services ("DSHS") expend the federal funds it receives, including the Social Security benefits it receives as representative payee for children in foster care, to conserve to the maximum extent possible State public assistance funds and to "cover the child's cost of care", without regard to the best interests or special needs of the child. To effectuate these State law mandates, DSHS applies to become the representative payee of children in its care and enforces a "cost recovery policy" pursuant to which it:

(1) allocates all of the Social Security funds it anticipates receiving in the following year to offset the projected budget costs of its foster care program and (2) reimburses itself for a broad range of foster care costs by causing substantially all of the benefits received on behalf of a child to be transferred from a trust fund within the State Treasury to DSHS without regard to the special needs or best interests of the child. The Washington Supreme Court held that the State statutes and regulations governing DSHS created a debtor-creditor relationship between the child and the State.

Does the Washington Department of Social and Health Services's cost recovery policy violate § 407(a)'s prohibitions against the assignment of future Social Security payments and against use of legal process to seek reimbursement from Social Security benefits?

2. This Court held in *Philpott* v. *Essex County Welfare Board*, 409 U.S. 413 (1973) and *Bennett* v. *Arkansas*, 485 U.S. 395 (1988) that 42 U.S.C. § 407(a) imposes a "broad bar" on the use of any legal process to reach Social Security benefits to reimburse creditors, even if the creditor is a State providing the entirety of the beneficiary's "current care." Can the Washington Department of Social and Health Services escape the prohibitions of § 407(a) by causing itself to be designated as the beneficiaries' representative payee under § 405(j)?

3. Does the Washington Department of Social and Health Services violate both § 407(a) and its obligations under § 405(j) as the representative payee of children in foster care when it fails to use the Social Security benefits it receives in the children's best interests and instead uses the benefits to reimburse itself for (a) past due foster care costs; (b) administrative costs unrelated to current maintenance; (c) foster care benefits the child is not legally obligated to pay; and (d) its costs of caring for the child without first addressing the child's special needs?

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INTRODUCTION

The Washington Department of Social and Health Services ("DSHS" or the "Department") has asked this Court to issue a writ of certiorari to the Washington Supreme Court to determine whether a representative payee violates the anti-alienation provisions of § 407(a) of the Social Security Act when it uses Social Security benefits to pay for current maintenance of the beneficiary. Although DSHS characterizes the Washington Supreme Court's decision as having answered this question in the affirmative, the court did not reach any such broad conclusion. The Washington Supreme Court did determine, however, after reviewing the specific practices and procedures of DSHS and the statutes and regulations governing the Department, that those statutes and regulations created a debtor-creditor relationship between certain children in foster care and the State.

The Washington Supreme Court held that the Department's "cost recovery policy," which required it to transfer the Social Security benefits of the children in its care to the State Treasury to pay the statutorily created debt without regard to the needs of the individual child, violated both § 407(a)'s anti-alienation provision and § 405(j)'s requirement that representative payees act in the best interests of the children in their care. *Keffeler* v. *State Dep't of Social & Health Servs.*, 145 Wash. 2d 1, 32 P.3d 267 (2001). The Washington Supreme Court's decision therefore rests on its interpretation of the effect of Washington State statutes and regulations, and not, as the State suggests, on any broad-brushed interpretation of the Social Security regulations. The rather specific interpretation of State law that drove the Washington Supreme Court's decision in this case is not worthy of this Court's review.

STATEMENT

A. DSHS's Use Of Social Security Benefits To Reimburse Foster Care Expenditures

1. Washington State's Foster Care Program. The Revised Code of Washington § 74.13.031 requires DSHS to provide foster care to children in Washington who are runaway, dependent, or neglected. On behalf of these children, the Children's Administration unit of the Department ("Children's") recruits foster parents. Current maintenance costs of children in foster care are paid in the first instance by their foster care parents, who are required by law to provide food, clothing, shelter, healthcare, and guardianship. A portion of the cost of providing food, clothing, and shelter to a foster child is reimbursed by the State of Washington through a stipend paid to the family in the following month. With the exception of a narrow class of exceptional children, the amount of the stipend depends only on the age of the child. The foster care family receives the same amount no matter how much it actually spent for the child's care. The federal government funds about one-third of the cost of the State's foster care program through TANF grants, Title IV-E, and similar programs.[1] (A-70 ¶ 85; A-109.)[2]

State statutes also direct the Department to act as the custodian of funds coming into its possession on behalf of

1. In 1996, Congress abolished the Aid to Families with Dependent Children ("AFDC") programs, replacing it with the Temporary Assistance to Needy Families ("TANF") program, a system of block grants to states meant to provide cash assistance to low-income families with children. Federal funding for foster care is also provided to the states pursuant to 42 U.S.C. § 672, commonly referred to as Title IV-E.

2. Citations in this brief to the Appendix to the Petition for a Writ of Certiorari appear as "A-" followed by the specific page(s) and paragraph(s), where applicable.

the children in its custody. Wash. Rev. Code § 74.13. DSHS may expend these funds to meet such personal needs as the Department deems "proper and necessary" or may apply such funds "as reimbursement, . . . against the amount of public assistance expended on behalf of said person during the period for which the benefits, payments, funds or accruals were paid." Wash. Rev. Code § 74.13.060.

Although Washington statutes authorize use of the funds to pay for the personal needs of the beneficiary, the Department's regulations define a narrower use of the funds: "If a child in foster care is entitled to financial benefits the income received *shall* be used on behalf of the child to help pay for the cost of the foster care received." Wash. Admin. Code § 388-70-069, *repealed by* Wash. St. Reg. 01-08-047 (Apr. 30, 2001). During the pendency of this action, this regulation was replaced by one that even more specifically limits the Department's use of the funds: "The department must use income not exempted to cover the child's cost of care. . . ." Wash. Admin. Code § 388-25-0210. Both regulations incorporate a definition of "income" that expressly includes both Social Security Supplemental Income ("SSI"), which is payable in the event the child is permanently disabled, and Social Security survivor benefits ("SSA"), which are payable in the event a parent eligible for Social Security dies prematurely or is permanently disabled.

2. DSHS's Reimbursement Procedures. Federal law provides a process by which a "representative payee" can be appointed to administer a child's benefit payments. 42 U.S.C. § 405(j). The Social Security Act favors appointment of parents and relatives and forbids appointment of creditors, unless they are institutions licensed by the state. 42 U.S.C. § 405(j)(3)(B). The payee is to be selected based upon who will best serve the interests of the child. 20 C.F.R § 404.2020; 20 C.F.R. § 416.620. States are not favored for selection as representative payees. 20 C.F.R. § 404.2021.

When an eligible child is placed in the custody of DSHS, DSHS makes an application for Social Security benefits on behalf of the child and names itself as the child's representative payee. DSHS deposits the Social Security benefits it receives as representative payee to a "Foster Care Trust Fund Account" at the Office of the State Treasurer. (A-52 ¶ 17.) Each month, the Trust Fund Unit accesses Children's computer generated list of "reimbursable foster expenses" to determine how much of the children's SSI and SSA funds it will direct the State Treasurer to pay to the Children's Administration Unit. (A-56 ¶ 28.) In general, if the amount in the trust fund account is adequate to reimburse the entire cost of foster care, as claimed by Children's, the entire claimed amount is paid. (A-56 ¶ 29.) Any remaining balances are carried over and are subject to intermittent account sweeps. (A-63 ¶ 58.) Account sweeping results in taking all of the Social Security funds which have accumulated to that date and applying them to all of the State's accumulated reimbursable foster care expenses. (A-63 ¶ 58.) Reimbursable expenses include not only the stipend paid to the child's foster family, but also a number of other costs, including case management services, travel and training of social workers, and general administrative costs. 145 Wash. 2d at 30, 32 P.3d at 281.

Social workers assigned to particular children are permitted to request "waiver of reimbursement" so that a foster child's Social Security benefits can be used for some special expenditure such as orthodonture (if medically necessary and not merely cosmetic), special clothing, or other needs. Whether these requests are granted rests in the discretion of the Trust Fund Unit. (A-57 ¶¶ 30-33.) A ten year review of the revenue and expenses charged to a random sample of 48 accounts showed that such special expenditures are seldom authorized. In the sampled accounts, only 3% of the Social Security benefits were used to purchase special items or provide special care. (A-60 ¶ 47.) Only 10 of the 48 children received any special needs disbursements. (A- 60 ¶ 47.)

The Department assigns in advance of its receipt 100% of the Social Security benefits it receives on behalf of children in foster care to be used to offset the costs of its foster care program. When the Department formulates its foster care budget, it estimates the amount it will receive in Social Security benefits as representative payee of children in foster care. It then offsets its budget request to the State legislature by the full amount of expected Social Security benefits. (A-55 ¶¶ 22, 23.) Any use of Social Security benefits to provide for a beneficiary's special needs necessarily causes the Department to exceed its budget.

B. The Administrative Proceedings

In 1990 Danny Keffeler entered the State of Washington's foster care system. Shortly thereafter, his mother died, making him eligible for SSA (survivor) benefits under the Social Security Act, 42 U.S.C. § 402(d). Danny's grandmother, Wanda B. Pierce, could not personally care for him, but was appointed guardian of Danny's estate. She applied for SSA benefits on his behalf and began receiving those benefits as Danny's representative payee, pursuant to 42 U.S.C. § 405(j). Ms. Pierce administered the benefits through the guardianship estate. She expended some funds for Danny's special needs and conserved the remainder to pay for college.

In April 1991, the Social Security Administration notified Ms. Pierce that she was being replaced as Danny's representative payee by the Department at the Department's request. Ms. Pierce timely appealed her removal and was reinstated in January 1993. Prior to Ms. Pierce's reinstatement, the Department received approximately $5,000 as Danny's representative payee.

In February 1994, the Department sought to remove Ms. Pierce as Danny's legal guardian because of her refusal to pay Danny's Social Security benefits over to the State as reimbursement for the cost of Danny's foster care. The Department simultaneously filed a creditor's claim

against Danny's estate to recover the SSA benefits received by Ms. Pierce as Danny's representative payee. The Department abandoned this claim once counsel for Danny's estate asserted that the claim was bared by § 407(a)'s anti-alienation provisions.

Determined to obtain Danny's Social Security benefits, the Department then appealed Ms. Pierce's reinstatement as representative payee to the Social Security Appeals Council. The Appeals Council remanded the matter back for reconsideration by an Administrative Law Judge, who again denied the Department's request. Although the Department filed an appeal of that decision, the Department abandoned the appeal once the present case was filed.

C. The Proceedings In The Washington Courts

Danny Keffeler filed a class action complaint in the Superior Court of Okanogan County on April 18, 1995, seeking to end the Department's practice of using Social Security benefits to offset the cost of foster care without regard to the special needs of the child. The Complaint also sought restitution of the funds used by the Department for that purpose. In March 1997, the trial court certified a class consisting of:

> All foster children within the State of Washington, past, present and future in foster care that receive [either SSA or SSI benefits] for whom the State of Washington acts or has sought to act as "representative payee."

145 Wash. 2d at 14, 32 P.3d at 273.

1. The trial court's initial ruling and injunction. In response to the parties' cross motions for summary judgment, the trial court granted Respondents' motion for summary judgment. The court held that the statutes and regulations pursuant to which the Department acts as representative payee for children in foster care and the

Department's use of those funds to reimburse itself for the cost of the State's foster care program violated the anti-alienation provision contained in 42 U.S.C. § 407(a).

The trial court enjoined the Department from seeking to have itself appointed representative payee in place of private representative payees or from requiring private representative payees to pay Social Security benefits over to the Department.[3] The court's order further requires the Department to hold in trust any funds it receives as representative payee for children in foster care; bars the Department from administering the funds to offset the State's cost of maintaining a child in foster care; and requires the Department to notify the guardians of children in foster care of their right to appeal the Department's appointment as representative payee. The injunction also requires the Department to provide an accounting of all funds received as representative payee of the class members and orders the creation of a "common fund" from which to pay the claims of children whose Social Security benefits had been wrongly taken by the Department.

The Department appealed, and the Washington Court of Appeals immediately certified the case to the Washington Supreme Court, which accepted the certification. The Washington Supreme Court stayed the trial court's order during the pendency of the appeal.

2. The Washington Supreme Court's remand for further findings. After extensive briefing by Respondents, the Department, and the Social Security Administration as amicus, the Washington Supreme Court remanded the case

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3. Although the Social Security Administration continues to assert that state agencies can compel private representative payees to turn over Social Security benefits they receive on behalf of children in foster care, the Department has abandoned that position and agrees that it improperly attempted to force Ms. Pierce to surrender Danny's benefits.

to the trial court for additional findings of fact regarding the Department's specific practices, the number of children in foster care, and the number of children in foster care receiving Social Security benefits. On remand, the trial court entered additional findings of fact, based primarily on the stipulations of the parties. (A-46 through A-111.) Among other facts, the trial court found that the Department reduces its budget request by the amount it anticipates it will receive as representative payee; that the Department applies to be representative payee for the sole purpose of obtaining money to offset the cost of foster care; that the Department sometimes "sweeps" accounts by using accumulated benefits to pay for all of the State's past foster care expenses; and that the Department may "double dip" by reimbursing itself for expenses already paid for by the federal government or by parents. (A-55 ¶¶ 22, 23; A-69 ¶ 82; A-70 ¶ 88.) *See* 145 Wash. 2d at 16, 32 P.3d at 274.

3. The Washington Supreme Court's ruling after remand. After remand, the Washington Supreme Court held that the reimbursement practices of DSHS as representative payee violate § 407(a). After reviewing the State statutes and regulations governing DSHS's use of Social Security benefits received on behalf of children in foster care against the backdrop of the federal laws governing representative payees, the Court concluded that the "facial logic of [the Department's] reimbursement scheme demonstrates a creditor relationship, a relationship involving creditor-type acts, vis-a-vis foster children and their SSA benefits." *Id.* at 18, 32 P.3d at 275.

The majority also questioned whether, apart from any violation of § 407(a), the use of Social Security benefits to reimburse State public assistance funds was consistent with a representative payee's obligation to use the funds in the best interests of the beneficiary. 145 Wash. 2d at 24, 32 P.3d at 278.

> Using this money for the care and maintenance of the beneficiary, as required under 20 C.F.R. 404.2035(a), would indeed be in the best interest of the beneficiary, but that is significantly different from using the money to reimburse the State for payments it made for the care and maintenance of the foster child — especially when that payment to the State cannot be legally compelled and, moreover, could be used or conserved for other special needs of the child.

Id.

In summarizing its holding, the court concluded that DSHS's acts of reimbursement were those of a creditor or were a "creditor-type action" preempted by § 407(a). The court found that DSHS's status as representative payee did not change the analysis of its ability to use the Social Security benefits it received as reimbursement.

Three justices concurred in part and dissented in part. The concurrence agreed with the majority that the practices of the Department were unlawful because the Department acted as a creditor when it "impermissibly used social security funds to reimburse itself for *past due* foster care payments" and for "other expenses not directly related to current maintenance." 145 Wash. 2d at 27, 33, 32 P.3d at 279, 282. The concurrence found that DSHS violated federal law by putting its need for reimbursement ahead of the needs of the foster children thus creating a fundamental conflict between its roles as representative payee and creditor. *Id.* at 30, 32 P.3d at 281. The concurrence diverged from the majority, however, based on its belief that under the federal regulations, the Department could use Social Security benefits to pay for current maintenance costs, "*provided that any special needs of the children are satisfied first.*" *Id.* at 27, 32 P.3d at 279 (emphasis added). The concurrence also criticized DSHS for violating federal law by reimbursing itself for administrative expenses unrelated to current care.

D. The Stay

DSHS applied for a stay of the Washington Supreme Court's mandate. After calling for a response and receiving the views of the Solicitor General, the Court granted a stay pending action by the Court on the Department's petition for certiorari.

REASONS FOR DENYING THE WRIT

A. The Question Presented As Stated By Petitioner Was Not The Question Resolved By The Washington Supreme Court's Decision Below And The Petition Assumes And Relies On Facts That Were Not Presented To The Washington Supreme Court.

The question presented as proposed by Petitioner is critically distinct from the question considered by the Washington Supreme Court. Petitioner asserts that the question presented is whether, as a general matter, representative payees violate § 407(a) of the Social Security Act when they use benefits to pay current maintenance costs of the beneficiary. The Washington Supreme Court, however, framed the issue much more narrowly. It understood the question to be whether the Washington Department of Social and Health Services violated § 407(a) when that Department used the Social Security benefit payments it received on behalf of foster children in the State of Washington to reimburse the State for costs incurred by the foster care program. The Washington Supreme Court's analysis and decision focused specifically on the nature of the duties and responsibilities of the Department, the statutes and regulations governing the Department, the administration of the foster care program in the State of Washington, and the statutes and regulations governing the obligations of children in foster care in reaching its conclusion.

Several points in the Washington Supreme Court's decision confirm that the Court was focused on the conduct of the Washington Department of Social and Health Services and not on the authority of representative payees in general. At the beginning of its opinion, the court describes the issue presented to be: "Does *DSHS* violate 407(a) of the Social Security Act when, as representative payee under 405(j) of the Act, it uses Social Security benefits to pay current maintenance costs of children in foster care?" 145 Wash. 2d at 4, 32 P.3d at 268 (emphasis added). Although this formulation of the question hints at the more general issue DSHS contends the court decided, the remainder of the opinion confirms the contrary. The 8 pages that follow provide a detailed description of the statutes and regulations of the State of Washington that govern the provision of foster care services and the duties and obligations of the Department, including a description of the State's "cost recovery policy." After briefly describing the Social Security regulations applicable to representative payees, the Court then returns to a description of the activities of the Department in administering the Social Security benefits received on behalf of children in foster care.

In announcing its holding, the Court states: "DSHS's actions as representative payee violated 42 U.S.C. § 407(a)." 145 Wash. 2d at 16, 32 P.3d at 274. In describing the "crucial question," the court makes clear that it is the nature of DSHS's particular reimbursement scheme that is determinative of the issue before it:

> Whether DSHS acts as a creditor when it reimburses itself for foster care costs out of the foster children's Social Security Administration (SSA) entitlements is the crucial question. If DSHS's reimbursement scheme is that of a creditor, the antiattachment provisions of § 407(a) apply and DSHS's cost recovery policy runs afoul

> of a federal statute which preempts state law under the Supremacy Clause of the United States Constitution.

145 Wash. 2d at 17, 32 P.3d at 275 (citation omitted).[4]

The court concludes that the scheme utilized by DSHS, pursuant to Washington State statutes and regulations, does establish DSHS as a creditor of the children in foster care:

> As DSHS presently conceptualizes the matter, RCW 74.13.060 (and its implementing regulation, former WAC 388-70-069) requires it to reimburse itself for the public assistance it has meted out to foster children from money, including SSA entitlements, that come into the children's possession. If the Legislature and DSHS did not hold the costs of foster care were somehow "owed" back to the taxpayers, it would not claim the right of DSHS to "reimburse" itself on the taxpayer's behalf.
>
> . . . .
>
> Accordingly we hold each instance of reimbursement makes DSHS a creditor, or, if not a creditor, then at least committed to a creditor-

4. The Petition asserts that the Department does not reimburse past costs from Social Security benefits and describes a system that carefully uses benefits to refund the cost of care incurred in the preceding month only out of benefits received for that particular month. Unfortunately, the record in this case, comprised almost entirely of facts stipulated by the parties in response to the Washington Supreme Court's request for additional information on how the Department used the foster children's Social Security benefits, fails to provide any support for the description of the Department's accounting practices offered to this Court. That Petitioner relies on a description of its practices that was not submitted to the Washington Supreme Court is another reason why the Petition for Certiorari should be denied.

> type action that is preempted by the "broad bar" of § 407(a).

145 Wash. 2d at 23, 25, 32 P.3d at 278.

The majority then goes on to express "serious[] doubt" as to whether DSHS's use of Social Security benefits "to reimburse the state for its public assistance expenditure is in all cases, or even some, 'in the best interests of the beneficiary.'" *Id.* at 24, 32 P.3d at 278.

Nothing in the Washington Supreme Court's opinion suggests a conclusion that representative payees are generally barred by federal law from utilizing Social Security benefits to pay current maintenance of beneficiaries. Instead, its opinion was wholly focused on the debtor-creditor relationship it found that State statutes and regulations created between DSHS and those children in foster care that received Social Security benefits.[5] If the Washington Supreme Court believed that representative payees generally could not use Social Security benefits to pay for current maintenance, its remand for further factual findings about the specific practices of the Department and its detailed examination in its opinion of the actual policies and procedures of DSHS would have been wholly unnecessary.

5. The concurring Justices of the Washington Supreme Court agreed substantially with the majority's analysis that Washington law required DSHS to act as a creditor of children in foster care in violation of the Social Security Act.

> I agree with the majority that in relying on RCW 74.20A.010, DSHS has given preference to the interests of the taxpayer over the special needs of foster children and has acted as creditor by reimbursing itself for past payment of foster care, directly contrary to §§ 405(j) and 407(a) of the Social Security Act.

145 Wash. 2d at 32-33, 32 P.3d at 282.

The Washington Supreme Court's conclusion that State law requires DSHS to act as the creditor of children in foster care who receive Social Security benefits does not warrant certiorari review by this Court. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). Moreover, DSHS asks this Court to review a question that was not decided by the Washington Supreme Court. Certiorari should not be granted to answer a hypothetical question that was not the basis of the ruling below. *See Conway* v. *California Adult Auth.*, 396 U.S. 107, 110 (1969) ("Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court.").

B. *Keffeler* Does Not Present A Split of Authority; The Washington Supreme Court's Decision Rests On Factual Conclusions That Distinguish Keffeler From Those With Which It Is Asserted To Conflict.

1. *Mason, King,* and *C.G.A.* The Department contends that this case is ripe for certiorari as it "squarely conflicts" with decisions of other courts, including *Mason* v. *Sybinski*, 280 F.3d 788 (CA7 2002); *King* v. *Schafer*, 940 F.2d 1182 (CA8 1991), *cert. denied sub nom. Crytes* v. *Schafer*, 502 U.S. 1095 (1992); and *C.G.A.* v. *Alaska*, 824 P.2d 1364 (Alaska 1992). (Cert. Pet., p.17.) Although these cases all involve the application of § 407(a) within the context of a State representative payee, they do not address the key issue in *Keffeler*: whether a state can comply with its fiduciary duty as representative payee to administer Social Security benefits in a child's best interest while simultaneously acting under state laws and regulations that require that it transfer to the state treasury all Social Security benefits received on behalf of a child in foster care without regard to the needs of the child.

Keffeler is harmonious with *Mason*, *King*, and *C.G.A.* on the issues raised in the petition. All agree that (1) neither the Social Security Act nor the regulations contain a *per se* bar against a state serving as representative payee, and (2) a representative payee may use Social Security benefits to pay for current maintenance if doing so is in the beneficiary's best interest.

Keffeler goes further to address two issues not presented in those cases: (1) whether the cost recovery policy dictated by Washington State statutes and regulations violates § 407(a), and (2) whether it is in the best interest of a foster child to apply Social Security funds to reimburse general state public assistance. *Mason*, *King*, and *C.G.A.* simply do not address and provide no analysis relevant to the first point, as they did not involve a legislative and regulatory scheme commanding the transfer of the benefits to the state treasury regardless of the best interest of the beneficiary. As to the second point, these three cases are so factually dissimilar to the foster care scheme at issue in *Keffeler* that they neither conflict with *Keffeler* nor offer any insight into whether reimbursement under the Washington foster care violates the anti-attachment clause or could ever be in a child's best interest.

First, *Mason*, *King*, and *C.G.A.* all arose in the context of institutional care, and accordingly fall under a different subsection of the regulations than does Washington's foster care scheme. In *King* and *Mason*, the plaintiffs were residents of state mental hospitals, while C.G.A. was incarcerated in a "youth center." In *King* the state department of mental health had been appointed and acted as the plaintiffs' representative payee,[6] while in *Mason* it was the state hospital itself, and in

6. Just as in *Keffeler*, there was a subclass of plaintiffs in *King*, who had private representative payees. As did the Washington court, the Seventh Circuit held that the State violated § 407(a) when it threatened to use legal process against these representative payees to collect SSI benefits for reimbursement of the costs of care.

C.G.A., it was the Division of Family and Youth Services. In each of these cases, the state assessed the plaintiffs (or in the case of *C.G.A.*, his mother) for the cost of their care.

The state agencies and hospital discussed in *Mason, King,* and *C.G.A.* were governed by different regulations than those applicable to DSHS. Ordinarily, the institutions in *Mason, King*, and *C.G.A.* would have been prohibited from serving as representative payees because they were creditors providing "goods or services for consideration." 42 U.S.C. § 405(j)(2)(C)(i)(III). The regulations specifically exempt, however, "a facility that is licensed or certified as a care facility under the law of a State or a political subdivision of a State," and "a person who is an administrator, owner, or employee of a facility referred to [*supra*] if such individual resides in such facility, and the certification of payment to such facility or such person is made only after good faith efforts . . . to locate an alternative representative payee." 42 U.S.C. §§ 405(j)(2)(C)(iii)(III) & (IV). Although the Commissioner for the Social Security Administration argued in its amicus brief to the Washington Supreme Court that DSHS is "like" a licensed state care facility, DSHS is not a "licensed or certified care facility" and cannot rely on the exemption provided by §§ 405(j)(2)(C)(iii)(III) & (IV). *See* Amicus Br. of Kenneth Apfel, submitted as a lodging, L-4, 12.

Perhaps an even more important distinction that can be drawn between the institution cases and foster children is that the regulations specifically provide that when a beneficiary is institutionalized "because of mental or physical incapacity" "current maintenance" is defined to include "the customary charges made by the institution." 20 C.F.R. § 404.2040(b). Accordingly, in *King* and *Mason*, the institutions' standard monthly bills fell within "current maintenance" under the regulations and were properly payable, if it were in the beneficiary's best interest to do so. Under § 404.2040(a), applicable to non-institutionalized beneficiaries, there is no

provision for the payment of a flat monthly fee; rather funds are to be expended on actual costs of care.

Second, in *King*,[7] it appears that at least some of the plaintiffs needed to "spend down" their SSA benefits in order to qualify for Medicaid.[8] Under Social Security regulations, SSA benefits are included as income in calculating an individual's Medicaid eligibility. If an individual would be eligible but for the fact that his income exceeds the income limitation, he may qualify for medical assistance if he "spends down" his income by expending it on medical costs. 42 C.F.R. §§ 435.700 - 845. Accordingly, it may be in a beneficiary's best interest to spend down his income by reimbursing the state for the cost of his institutionalization, if doing so allowed him to qualify for Medicaid.[9] This issue did not arise in *Keffeler*.

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7. *King* involved a class of plaintiffs who had been involuntarily committed to the care and custody of the Missouri Department of Mental Health after being adjudicated not guilty by reason of "'mental disease or defect.'" 940 F.2d at 1183-84. Each of the plaintiffs received monthly Social Security benefits after having been determined to be totally disabled due to mental illness. *Id.* at 1184. The opinion does not reveal whether the plaintiffs were receiving SSA Social Security insurance benefits or Title XVI Social Security disability benefits. As the opinion refers to 20 C.F.R. § 404.2010, a regulation addressing SSA recipients, at least some of the plaintiffs must have been receiving SSA benefits. Subject to certain restrictions, all persons receiving SSI are eligible to receive Medicaid. 42 C.F.R. §§ 435.120, 435.121

8. Although the opinion does not discuss the Medicaid issue explicitly, the court's reference to the $30 personal expense allowance indicates that the Medicaid Social Security regulations were at issue. *See id.* at 1184 ("Pursuant to Social Security Administration guidelines, thirty dollars of each patient's monthly benefit is available for personal expenses.")

9. It appears that the non-institutional representative payees refused to do so. The court held the State could not coerce those representative payees into paying over the benefits because to do so would violate § 407(a).

King and *Mason* are also distinguishable from *Keffeler* because in assessing the best interest of the beneficiary, the *King* and *Mason* representative payees considered the beneficiary's personal needs before determining what amount to apply toward the cost of institutional care.[10] In *King*, the plaintiffs were allowed to retain a personal allowance of at least $30 per month.[11] In *Mason*, the plaintiff was allowed to keep approximately $100 per month before her monthly benefits were applied toward the cost of care. In upholding Indiana's practice, the Seventh Circuit panel found: "Indiana hospitals follow carefully the SSA's guidelines regarding use of recipients' benefits. They apply a portion of the money to recipients' personal needs — clothing, spending money, and the like — and only then do they apply a portion of the benefits to institutional costs." 280 F.3d at 793.

In contrast, the trial court in *Keffeler* made a finding of fact that there was no uniform system in place to ensure that a child's special needs were being considered. (A-59 ¶ 41.) A review of the random sampling of foster children (appended to the Findings of Fact) demonstrates that some children did not receive a single disbursement while in foster care, often over a period of several years. (A-60 ¶ 47.)

2. *Nelson* and *Mellies*. The Department further argues that *Keffeler* presents a split of authorities because it is "in substantial tension" with *Mellies* v. *Mellies*, 815 P.2d 114 (Kan. 1991) and *In re Guardianship of Nelson*, 547 N.W.2d

10. *C.G.A.* does not address this issue, as the case was referred to the Social Security Administration for an initial determination.

11. This amount was likely mandated by 42 C.F.R. § 435.735(c)(1). If an individual receiving SSI benefits resid for more than 30 days in a "public institution" that is a "medical care facility" where Medicaid pays more than 50% of the cost of care, his benefits are reduced to $30 per month. 20 C.F.R. §§ 416.211(b) and 416.414. Social Security SSI regulations further provide that the $30 cannot be used other than for the beneficiary's personal needs, and not for current maintenance.

105 (Minn. Ct. App. 1996). (Cert. Pet., p. 20.) *Mellies* and *Nelson* address whether it is appropriate for a parent, acting as representative payee, to use a child's Social Security benefits for the cost of the child's care in light of the parent's obligation to support the child. The Kansas and Minnesota courts held that it was permissible for the parent to spend the funds on the child's current needs rather than conserve them for future use.

Again, these cases stand only for a proposition not inapposite to *Keffeler* — it is permissible under the Social Security Act and regulations for a representative payee to use Social Security benefits to pay for current maintenance if it is in the child's best interest to do so. The parents in these cases were not under a legislative mandate to conserve their own funds, were not accused of failing to identify and meet any special needs of the child, and were not found to have used the funds for expenses unrelated to current care or the special needs of the child. The parents therefore were not acting under the same conflict of interest presented in *Keffeler*. Moreover, in these cases the children's benefits were used for current costs directly attributable to the child, not to repay an asserted debt. *Keffeler* would not prohibit a Washington State parent serving as representative payee from using his child's benefits to pay for current maintenance and therefore presents no conflict with *Mellies* and *Nelson*.

C. *Keffeler* Is Fully Consistent With The Regulations Adopted By The Social Security Administration.

Keffeler is consistent with and in fact advances the goals and policies underlying the regulations adopted by the Social Security Administration, which specifically require that the representative payee use Social Security payments "in the best interests of the beneficiary." 20 C.F.R. § 404.2035; *see also* 20 C.F.R. § 404.2021 ("Our primary concern is to select the payee who will best serve the beneficiary's interest.")

The Department correctly notes that Social Security payments may permissibly be used for the "use and benefit of the beneficiary if they are used for the beneficiary's current maintenance," including "cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." 20 C.F.R. § 404.2040. (Cert. Pet., p. 5.) This regulation is permissive, however, not mandatory, and such expenditures are subject to the overall requirement that all payments made by a representative payee *must* be used "in the best interest of the beneficiary." 20 C.F.R. § 404.2035. The Department, however, contrary to the mandate of the federal regulations, is *required* by the Washington Administrative Code § 388-25-0210 to use the children's Social Security to offset the State's foster care costs without regard to or consideration of "the best interest of the beneficiary."[12] As both the majority and minority opinions of the Washington Supreme Court held, this requirement results in an unlawful subordination of the Department's fiduciary duty as representative payee to act in each child's best interest to the interest of the State as a creditor. The Washington regulations, not the *Keffeler* decision, directly conflict with the regulations of the Social Security Administration applicable to representative payees.

Moreover, rather than use payments in "the best interest of the beneficiary" or toward costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items,

12. The concurring and dissenting justices of the Washington Supreme Court also found that Washington's cost recovery policy requiring DSHS to conserve expenditure of State public assistance funds on foster care and thus lighten the burden on taxpayers created a further conflict with DSHS's obligations as representative payee. *See* Wash. Rev. Code § 74.20.010 ("It is the responsibility of the state of Washington through the state department of social and health services to conserve the expenditure of public assistance funds, whenever possible, in order that such funds shall not be expended if there are private funds available or which can be made available by judicial process or otherwise to partially or completely meet the financial needs of the children of this state.").

the Department uses the Social Security payments to offset the general costs of the State's foster care program and for expenses that are unrelated to current maintenance. As found by the trial court, "[f]or the sole purpose of obtaining reimbursement for foster care costs, DSHS applies to the Social Security Administration to be appointed representative payee for all children in foster care who are eligible for social security benefits." (A-125.) *See also Keffeler*, 145 Wash. 2d at 16, 32 P.3d at 274. The Department has presented no evidence throughout this protracted litigation that it "makes any regular, systematic or uniform attempt, on a monthly basis or otherwise, to determine what 'extra items' and/or 'special needs' would directly benefit the children in State foster care before applying the SSA and SSI funds, in its control, to reimburse" general foster care costs. (A-59 ¶ 41.)

The Department's practice of allocating all Social Security payments to its own budget also plainly runs afoul of 42 U.S.C. § 407(a), which provides in pertinent part that the "right of any person to any *future* payment under this subchapter *shall not be transferable or assignable*, at law or in equity." (emphasis added); (A-55 ¶¶ 22, 23) ("In developing the amount of the State's funds needed to make up the balance of the total foster care budget the State includes as part of its revenue resources, SSA and SSI payments anticipated to be received by DSHS as representative payee. The State's inclusion of anticipated SSA and SSI children benefit payments in the State budget reduces the amount of money that the legislature is required to appropriate to meet the State's foster care expenditure responsibilities."). By assigning the beneficiary's future payments to its own budget in advance of payment and thereby allocating the benefits to its general foster care budget, the Department assigns to the State the beneficiary's right to future payments.

The Department's practice of sweeping children's accounts and "double dipping" further illustrates the

Department's contravention of the letter and policies of the federal regulations. Rather than pay for "current maintenance," DSHS sweeps lump sum Social Security benefits into the State treasury to reimburse the State for past foster care expenses. (A-63 ¶ 58) ("'Account sweeping' sometimes results in taking all the Social Security funds, which have accumulated to that date, and applying them to all of the State's accumulated reimbursable foster care expenses."). For example, Jasmine Cotton, a foster child for whom the Department served as representative payee, received $11,676.29 in Social Security payments on May 8, 1996 (likely a lump sum Social Security award). On December 2, 1996, a lump sum amount of $11,696.00 in "reimbursements" was deducted from Ms. Cotton's account leaving a balance of $495.42. The State thus *reimbursed* itself for *past* foster care expenses of $11,696.00 dating back to April 1994. Ms. Cotton herself received no account disbursements during her three years in foster care. (A-100 and A-102.)

Finally, in contravention of federal law, the Department likely "double dips" by reimbursing the State for amounts already paid by the federal government under Temporary Assistance for Needy Families, Title IV-E, and parental support. In fact, "[t]he head of the Trust Fund Unit has known, since at least 1994, . . . that it potentially reimburses itself twice for the same months foster care expenses, once through use of the foster child's SSA and SSI money and once from parental support payments." (A-69 ¶ 81; *see* A-69 ¶ 82) ("The State may experience a double payment when it 'sweeps' the children's trust fund account to repay reimbursable foster care expenses which have accumulated from prior months where child support has already been paid."). *See also Keffeler*, 145 Wash. 2d at 31, 32 P.3d at 282 ("This sweeping of lump sums not only is unauthorized under any exception to § 407(a), but also often constitutes double reimbursement. The sums 'swept' to the treasury frequently

reimburse the state for amounts already paid by the federal government under Temporary Assistance for Needy Families or paid by parental support. DSHS apparently keeps no accurate record to allow tracing of the 'swept' sums."). Despite its uncontroverted knowledge of this double dipping, the State has not remedied its unlawful practice, which cannot be justified even under the Department's own interpretation of the Social Security Administration regulations.

The array of regulatory violations committed by DSHS counsels against a grant of certiorari in this case. DSHS's practices and procedures fail scrutiny even under its own conceptualization of the law and make this case a muddled mess. The scope and nature of the violations confuses the identification of the precise ground for the Washington Supreme Court's decision and limits the impact any decision this Court might render on the question presented as stated in the petition. To the extent the Court is interested in bringing additional clarity to the permissible conduct of states as representative payees, it should await the presentation of that question in a cleaner case.

D. The *Keffeler* Decision Affects Only The State Of Washington And Does Not Present A National Question.

The Department contends that "this case presents an important national question." (Cert. Pet., p.23.) Contrary to the government's suggestion, however, the *Keffeler* decision affects only the administration of Social Security benefits to foster children for whom DSHS serves as representative payee in the State of Washington. The decision in no way calls into question the way public agencies in *any* other state fulfill their roles as representative payee, nor does it diminish the incentive of governmental agencies to act in that capacity.

Instead, the *Keffeler* decision invalidates the way in which the Department, acting pursuant to the mandate of Washington statutes and regulations, is *required* to use the

children's Social Security benefits to reimburse the State for foster care costs in order to reduce the fiscal burden of the Washington taxpayers. Unlike representative payees in other states, the Department is deprived of any and all discretion to use the benefits "in the best interest" of the beneficiary. In its petition for certiorari, the Department does not expressly or impliedly contend that any other state is required by statute or regulation to act in a similar manner. The Department nonetheless would have this Court believe that the decision of the Supreme Court of Washington, which considered and enjoined *only* the actions of the Department in the State of Washington as it acts pursuant to Washington statutes and regulations, somehow will impact not only states serving as representative payees for foster children in their care, but also "every representative payee appointed by the Commissioner." (Cert. Pet., p.24.) This unsubstantiated claim cannot find support in the record or in the decision of the Washington Supreme Court.

In an effort to make this case appealing to the Court, the Department exaggerates its importance and universal impact. Although it may be true that other states that serve as representative payee use certain portions of a Social Security beneficiary's funds to offset the costs of current maintenance, that practice was not called into question by *Keffeler*. Instead, in *Keffeler*, the trial court made very specific findings of fact with respect to the Department's practices in the State of Washington, as it acts pursuant to Washington statutes and regulations, and the Washington Supreme Court thereafter held that the practices *of the Department in the State of Washington* are unlawful. In the face of this limited holding, the Department's contentions that this case impacts any agency or representative payee outside of the State of Washington does not support granting certiorari here and should summarily be rejected.

E. *Keffeler* Was Correctly Decided.

In *Philpott* v. *Essex County Welfare Board*, 409 U.S. 413 (1973), and *Bennett* v. *Arkansas*, 485 U.S. 395 (1988), this Court held that a state's use of Social Security benefits to reimburse itself for the cost of incarceration or welfare benefits violated § 407(a)'s anti-alienation provision, rejecting the state's arguments that it was entitled to such reimbursement because it was providing "care and maintenance" to the beneficiaries. *Philpott*, 409 U.S. at 416; *Bennett*, 485 U.S. at 397-98.

The position argued by the State of Washington — that a representative payee is free from the strictures of § 407(a)[13] — is incorrect. Section 407(b) states that "[n]o other law . . . may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." 42 U.S.C. § 407(b). Section 405(j) does not contain the required reference to § 407, and accordingly, does not except representative payees from the anti-alienation provision. The fact that the Department is the same entity wearing two hats — that of representative payee and that of service provider — does not mean that it is free from compliance with § 407(a). To the contrary, under the Washington scheme, even if the Department desired to regulate itself, its mandate to conserve welfare benefits places it under a conflict of interest that makes compliance with both state and federal law impossible. As stated by the Washington Supreme Court, "[i]f DSHS is allowed under § 405(j) to become a representative payee for the foster children, that fact does not establish the legality of taking the child's money." 145 Wash. 2d at 22-23, 32 P.3d at 277.

Taking the child's money is exactly what the Department does, both by allocating anticipated Social Security benefits

13. *See* Solicitor General's Amicus Br. at 20; Application for Stay at 16.

to its operating budget in violation of § 407(a)'s prohibition of the transfer or assignment of future benefits, and by reimbursing Children's Administration for foster care-related expenses from the funds it holds as representative payee through the Trust Fund Division, essentially allowing the funds to be subject to the claims of a creditor. The Department attempts to downplay the transfer to Children's from Trust Fund by claiming that it is a reimbursement "only in the accounting sense." (Cert. Pet., p.27.) Reimbursement is an accounting procedure, and to term it as such does nothing to change its character or the fact that it is prohibited by § 407(a).[14]

Section 405(j) does not provide a basis for upholding DSHS's cost reimbursement policy. Under § 405(j) and the accompanying regulations, benefits must be used not only for the "current maintenance" of the beneficiary, but also in the beneficiary's best interest. *See* 20 C.F.R. § 404.2035 ("A representative payee has the responsibility to (a) use the payments he or she receives only for the use and benefit of the beneficiary *in a manner and for the purposes he or she determines . . . to be in the best interests of the beneficiary. . . .*") (emphasis added). Even after concluding that an expense properly falls within "use and benefit," to fulfill its fiduciary duty, a representative payee must also assess whether an expenditure would be in the best interest of the beneficiary. There is no indication in the record or in the Department's briefing that it exercised any discretion in deciding to expend the children's funds on reimbursing the State rather than address other needs or conserve funds for the future.

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14. While an expense may be allowed by direct expenditure, it is barred once it takes on the nature of a debt. *See Conaway* v. *Social Servs. Admin.*, 471 A.2d 1058, 1063 (Md. App. 1984) ("As the Supreme Court has made clear, a state agency has no authority to take lump sum federal benefits and use them for reimbursement for past care. The State had an obligation to provide for Conaway; it cannot now seek reimbursement from funds which it could have used, but chose not to.").

While the failure to exercise the required discretion is a possibility anytime a representative payee is appointed, it was a certainty in this case because the Department was simultaneously acting under a legislative mandate to conserve public welfare funds and lessen the burden on state taxpayers. As indicated by the State's upfront budgetary allocation, it anticipated that it would use the children's SSI/SSA benefits in full to offset its overall foster care operating budget, unquestionably electing to fulfill its State legislated duty to conserve to the detriment of its duty to the children to use their benefits in their best interest. This fact is further supported by the fact that DSHS did not have a system in place to ensure that children's special needs were being met, or to notify social workers that these funds were even available.

The Department claims that it is permissible for a payee to satisfy a pre-existing debt "if the current and reasonably foreseeable needs of the beneficiary are met." Problematic to this approach, however, is the fact that the Washington courts found that there was no procedure in place to ensure that foster parents and social workers were aware that a child may have funds available for special needs. Jasmine Cotton, discussed above, received no special disbursements in her three years of foster care. It would be remarkable indeed that she had no needs that would have taken priority over the repayment of a debt.

By billing the children for the myriad of cost associated with their foster care and applying their SSI and SSA benefits to recoup these costs, the Department acts as a creditor. Regardless of the fact that it serves as representative payee, the Department cannot take the children's money to pay costs outside of those specifically provided for by the Social Security Act and regulations. To do so is simply a violation of § 407(a).

The Department argues that its scheme should not be struck down because it could possibly achieve the same economic effect through a different scheme. The fact remains that the current system violates federal law, and this Court rejected a similar "end result" argument in *Philpott*, 409 U.S. at 416, where the State attempted to argue that if the amount of Social Security benefits had been paid monthly, it could have reduced the amount of state welfare benefits and therefore should be able to seek reimbursement for the difference. The Court therein rejected this "implied exception." The Department is free to go to the Washington Legislature and ask that the system be reformed, a course it has not chosen to pursue.

F. The Decision Of The Seventh Circuit In *Mason v. Sybinski* Presents A Better Vehicle For Determining The Rights And Obligations Of States As Representative Payees Than Does This Case.

Because *Keffeler* was resolved by the trial court on motions for summary judgment without making specific findings of fact, the Washington Supreme Court, after hearing oral arguments from the parties, ordered that the case be remanded to the superior court for the record to be supplemented as to certain specified issues. The parties submitted several rounds of briefs as to proposed findings, resulting in the 98 findings of fact issued by the trial court. Although these findings are extensive, the description of how DSHS's cost reimbursement scheme works remains incomplete and is complicated by evidence that DSHS employed different procedures over the time frame covered by this case. Moreover, Petitioner, in making application to this Court, presents significant details that are found nowhere in the record. For example, Petitioner contends that it seeks reimbursement in March for the costs it incurred in January, but limits itself to the benefits received for the month of January. (Cert. Pet., p.10.) The record, however, provides no such detail and appears to affirmatively contradict that assertion. (A-56 ¶¶ 27, 28, 29.)

In contrast, the decision of the Seventh Circuit in *Mason* v. *Sybinski*, 280 F.3d 788 (CA7 2002), presents less complex facts on a cleaner record. Moreover, the issue raised in *Mason*, whether a state hospital's application as representative payee of that portion of a resident beneficiaries' benefits remaining after satisfying special needs to its own costs, absent that beneficiary's consent, was "other legal process" in violation of § 407(a), comes much closer to the question DSHS asks the Court to decide in this case. Counsel for Respondents have been informed that a petition for certiorari will be filed in *Mason* on or before May 11, 2002.

CONCLUSION

The critical feature of the Washington Supreme Court's analysis is its discernment that DSHS, acting under the directive of State statutes and regulations, was acting as a creditor when it transferred the Social Security benefits of children in foster care to the State treasury to reimburse itself for past due foster care costs, administrative expenses, and expenses already paid by the federal government or by parents of the children, without regard to the best interests or special needs of the individual children. The broader question suggested by Petitioner, whether representative payees generally may use Social Security benefits to pay current maintenance, simply was not addressed by the Washington Supreme Court. Moreover, the Petition relies on a description of how DSHS's reimbursement procedures work that is distinct from that provided to the Washington Supreme Court. Ultimately, the decision of the Washington Supreme Court was driven by its understanding of how specifically DSHS treated the Social Security funds it received. The Court even remanded the case to the trial court for specific findings on DSHS's practices and procedures. The State-specific determinations of the Washington Supreme Court do not warrant this Court's review. Moreover, the Court should decline to grant certiorari to review a question that was not

decided by the Washington Supreme Court, especially on a Petition that makes important factual assertions not supported by the record.

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